Filed 11/26/12 P. v. Rinehart CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. LARRY G. RINEHART, Defendant and Appellant.	D060482 (Super. Ct. No. SCE308705)

APPEAL from a judgment of the Superior Court of San Diego County, Peter C. Deddeh and Lantz Lewis, Judges. Affirmed.

A jury convicted Larry G. Rinehart of grand theft of personal property (Pen. Code, § 487, subd. (a))[1] and grand theft by an employee (§ 487, subd. (b)(3)) for embezzling funds from the Grossmont High School District's (the District) baseball team. The trial court sentenced him to 240 days in jail and stayed 60 days of the sentence pending his successful completion of five years of probation.

1 Further statutory references are also to the Penal Code unless otherwise specified.

On appeal, Rinehart contends the court erred by denying his pretrial motion to dismiss the information as untimely as a matter of law, and alternately, by denying his request during trial that the jury be instructed with CALCRIM No. 3410 on a statute of limitations defense. We disagree and affirm the judgment.

FACTS

Rinehart was a teacher with the District, and in 2002 he became head coach for the Monte Vista High School's varsity baseball team. He also ran the high school's off-season baseball club.[2]

Per the District's policy, the team had an associated student body bank account (ASB account) for team income and expenses. All funds raised or collected for the team were to be remitted to the District's finance office for deposit into the ASB account. The District did not allow coaches to have outside accounts for sports teams.

Rinehart nonetheless opened a credit union account, ending in numbers 518 (518 account), using the taxpayer identification number for Monte Vista High School. He was the only signatory on the 518 account, it had an automated teller machine (ATM) card associated with it, and he did not reveal it to the District.

Rinehart used a fundraising company to raise and collect donations for the team in exchange for 20 percent of the funds. The fundraising company never reported any donations to the District. Rinehart deposited the funds, including cash and checks, into

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2 For convenience we refer to the varsity team and the club together as the team.

the 518 account. He also ran a snack bar at games on a cash only basis, and he deposited proceeds into the 518 account.

Rinehart used the 518 account for legitimate purposes such as baseballs, field maintenance and snack bar supplies. He admitted, however, that in early 2005 he began using the 518 account as a "slush fund for his own personal use." He withdrew funds that eventually totaled approximately $16,000 to support a gambling habit. Rinehart initially claimed he reimbursed all of the funds by depositing cash and personal checks into the 518 account. Later, however, when he could not provide supporting documentation, he admitted that some of the deposited checks he attributed to himself were actually donations from team supporters. In a written statement, Rinehart acknowledged an unreimbursed amount of $3,565 for the 518 account.

In August 2006 Rinehart closed the 518 account and opened a new credit union account that ended in the numbers 241 (241 account). He again used the high school's tax identification number, he was the only signatory, and he did not reveal it to the District. An investigator determined Rinehart withdrew approximately $1,700 from the 241 account for gambling, and his last suspicious cash withdrawals from that account were on April 20 and 26, 2007. Rinehart admitted to the investigator that he used the funds withdrawn on those dates for gambling.

Further, Rinehart could not provide documentation or receipts for $49,267 in transactions on both accounts between 2005 and 2007. According to one casino, he lost approximately $60,000 gambling between 2002 and 2009. His 2005 loss was $15,728.68, his 2006 loss was $17,044.68, and his 2007 loss was $10,875.49.

DISCUSSION

I

Motion to Dismiss

Before commencement of trial, Rinehart moved to dismiss the case on the grounds of untimeliness. He contends the trial court erred by denying his motion.

"[S]tatutes of limitation are to be strictly construed in favor of the accused." (*People v. Zamora* (1976) 18 Cal.3d 538, 574.) "When a defendant challenges the timeliness of a prosecution, he or she may move to dismiss the charges before trial on the ground that the prosecution is time-barred as a matter of law, and may then also assert the defense as a fact-based issue at trial. [Citation.] Where . . . a defendant asserts a statute of limitations defense before trial, he or she bears the burden of proving that the limitations period has expired as a matter of law, and, where he or she fails to establish that the statute has run as a matter of law, a motion to dismiss must be denied." (*People v. Moore* (2009) 176 Cal.App.4th 687, 693.) "This motion is the functional equivalent of a motion for summary judgment in the civil context." (*People v. Lopez* (1997) 52 Cal.App.4th 233, 251.)

"The elements of theft by larceny are well settled: the offense is committed by every person who (1) takes possession (2) of personal property (3) owned or possessed by another, (4) by means of trespass and (5) with intent to steal the property, and (6) carries the property away." (*People v. Davis* (1998) 19 Cal.4th 301, 305.) "The intent to steal or *animus furandi* is the intent, without a good faith claim of right, to permanently deprive

the owner of possession. [Citation.] And if the taking has begun, the slightest movement of the property constitutes a carrying away or asportation." (*Ibid.*)

Section 801.5, the statute of limitation for grand theft (*People v. Moore*, *supra*, 176 Cal.App.4th at p. 692), provides the prosecution "shall be commenced within four years after discovery of the commission of the offense, or within four years after the completion of the offense, *whichever is later*." (Italics added.) Here, an information was filed on May 31, 2011. The case commenced for purposes of the limitations period, however, on March 10, 2011, when Rinehart was arraigned in superior court. (§ 804, subd. (c).) The information alleged a continuous grand theft that commenced on January 1, 2005, and was completed on July 17, 2007, and thus on its face it was timely.

Rinehart argues the information was nonetheless time-barred because the District was on notice of his crime in June 2006 when a team member's parent complained to the District about his single signatory credit union account and his mismanagement of team funds. For purposes of the discovery rule, courts have read a due diligence requirement into the limitations period. " 'The statute commences to run . . . after one has knowledge of facts sufficient to make a reasonably prudent person suspicious of fraud, thus putting him on inquiry." (*People v. Zamora*, *supra*, 18 Cal.3d at p. 562; *People v. Lopez*, *supra*, 52 Cal.App.4th at p. 246.) As the trial court pointed out, however, the People relied on the date of completion component of section 801.5 rather than the date of discovery. Thus, Rinehart's discussion of the discovery rule is unavailing.

Alternatively, Rinehart now contends he completed his crime on August 7, 2006, when he closed the 518 account. He asserts that while he admitted he did not reimburse

the District for all funds he withdrew from the 518 account for his personal use, "[t]here was no clear-cut evidence that any of [his] withdrawals in mid-2007 [from the 241 account for his personal use] were not reimbursed," and thus "there was insufficient proof of any permanent deprivation or intent to permanently deprive" associated with the 241 account.

Rinehart, however, did not raise this argument in the trial court.[3] Ordinarily, an appellant may not raise an issue for the first time on appeal. (*People v. Weaver* (2012) 53 Cal.4th 1056, 1082.)

Moreover, at the pretrial hearing it was Rinehart's burden to prove his crime was completed outside the statute of limitations as a matter of law. He did not, and indeed could not, satisfy his burden because neither the intent to later restore or make restitution for the property nor actual reimbursement is a defense to grand theft. (*People v. Shannon* (1998) 66 Cal.App.4th 649, 656; *People v. Costello* (1951) 107 Cal.App.2d 514, 518.) " 'Asportation of the property with the intention to appropriate it is sufficient to constitute larceny even though the property may subsequently be returned to the owner." (*Shannon*, *supra*, at p. 656.) "An intent to deprive the rightful owner of possession even temporarily is sufficient and it is no defense that the perpetrator intended to restore the property nor that the property was never 'applied to the embezzler's personal use or benefit.' "

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3 Rather, Rinehart argued the People's reliance on the completion date violated public policy and deprived him of a fair trial because the evidence of how he managed the team accounts had grown stale. Under section 801.5, however, an action for grand theft accrues on the date of discovery or completion, whichever occurs last, and the court lacked authority to thwart legislative intent by ignoring the plain language of the statute.

(*In re Basinger* (1988) 45 Cal.3d 1348, 1363.) Rinehart ignores that the jury was instructed "[i]ntent to deprive the owner of property, even temporarily, is enough" to prove grand theft, and "[i]ntent to restore the property to its owner is not a defense."

Under the undisputed evidence, Rinehart's grand theft was completed in April 2007 when he last withdrew funds from the 241 account with the admitted intent of using them for gambling, which is tantamount to claiming ownership of the funds. "[A]n intent to permanently deprive is shown by the assertion of a right of ownership in the property. . . . The test is, whether the person who takes the property assumes to exercise dominion over it as owner. " (*People v. Davis, supra,* 19 Cal.4th at p. 308.) Thus, the prosecution, which commenced on March 20, 2011, was timely.

II

CALCRIM No. 3410

Alternatively, Rinehart contends the court erred by denying his request that the jury be instructed with CALCRIM No. 3410, which pertains to a statute of limitations defense. At trial "the burden is on the People of establishing that the offense was committed within the applicable period of limitations. [Citations.] Failure to sustain that burden will result in vacation or reversal of the judgment of conviction." (*People v. Crosby* (1962) 58 Cal.2d 713, 725.)

Our high court has "held that criminal defendants have the right to have a jury decide factual issues relating to the statute of limitations." (*People v. Meza* (2011) 198 Cal.App.4th 468, 476, fn. 2, citing *People v. Zamora, supra,* 18 Cal.3d at pp. 563-564, fn. 25.) " 'It is settled that in criminal cases, even in the absence of a request, the trial

court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.' [Citations.] Included within this duty is the '. . . obligation to instruct on defenses, . . . and on the relationship of these defenses to the elements of the charged offense . . . ' where ' . . . it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense.' " (*People v. Stewart* (1976) 16 Cal.3d 133, 140.)

Rinehart asserts "there remained issues of fact concerning the limitations period—when it was discovered, and when it was completed—which the jury should have been instructed to consider by way of defense." As discussed, however, the discovery date is immaterial because the People relied on the completion date under section 801.5. Further, as with the motion to dismiss, his theory on the completion date is that to show the continuing grand theft was completed within the statute of limitations, the People were required to prove he did not reimburse the 241 account for all funds he withdrew in April 2007 for his personal use. As discussed, the theory is mistaken because his embezzlement from the 241 account was completed when he withdrew the funds and asserted ownership over them at gambling casinos.

We review instructional claims for abuse of discretion. (*Robinson v. Grossman* (1997) 57 Cal.App.4th 634, 642, fn. 6.) The court did not abuse its discretion as there was no evidentiary support for CALCRIM No. 3410.

DISPOSITION

The judgment is affirmed.

MCCONNELL, P. J.

WE CONCUR:

NARES, J.

HALLER, J.